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7 BEFORE THE STATE OF WASHINGTON
8 GROWTH MANAGEMENT HEARINGS BOARD
9 FOR CENTRAL PUGET SOUND

10 CASCADE BICYCLE, et al

11 Petitioner,

12 v.

13 LAKE FOREST PARK,

14 Respondent.

CPSGMHB Case No. 07-3-0010c

REPLY MEMORANDUM BY
CASCADE BICYCLE CLUB

15
16 **I. INTRODUCTION**

17 Cascade Bicycle Club submits this brief in reply to the Response Brief by Lake Forest
18 Park. This memorandum responds to the City's contentions in the order presented within
19 Cascade Bicycle's Hearing Memorandum.

20 **II. RESPONSE TO STATEMENT OF FACTS**

21 Although the issues before the Board are legal in character, a number of the City's
22 factual characterizations deserve a response. The City at 5 asserts that it has been the County
23 that has allowed the Burke-Gilman Trail "to deteriorate into a state of disrepair", without
24 accounting for the role that it has played in frustrating the County's efforts to repair the trail.
25

REPLY MEMORANDUM
BY CASCADE BICYCLE CLUB - 1

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1 Many of the measures that the City cites as efforts to address trail issues have in fact obstructed
2 efforts to improve the trail.

3 First, the City at 6 cites to its adoption of Ordinance 907 as a measure "that would
4 address issues raised regarding multi-use trails." However, Ordinance 907 chiefly served to
5 frustrate the County's improvement of the trail. It required that the portions of the Trail within
6 stream and wetland buffers (along McAleer and Lion Creek and potentially along the trail's
7 wet ditches) not be made of impervious materials, which would require tearing out the existing
8 asphalt and converting the surface to something allowing the infiltration of water. Ordinance
9 907 also prohibited at-grade crossings at each of the 11 intersections with roads and
10 driveways¹, unless it could be demonstrated that at each intersection "no other practicable
11 alternative" existed, Ordinance 907 at 2, City Ex. 556, thereby putting the County to the absurd
12 task of having to demonstrate for each intersection why a tunnel, bridge or detour to a side
13 street would be impracticable, when the driveways and minor roads either only have a
14 terminable right to cross the trail by a special use permit or no right at all.² See Ex. 532,
15 Atelier Report at 32.
16
17

18 Second, the City at 7 contends that it engaged Huitt-Zollars to obtain "the assistance of
19 qualified professionals" in trail development issues, as if the many consultants that supported
20 the work of the Citizens Advisory Group (CAG) had not been properly qualified. More
21 accurately, the City retained Huitt-Zollars to undercut the work done by CAG and to provide
22 the City some cover to reject the CAG's recommendations. As previously noted in Cascade's
23

24 _____
25 ¹ The Trail's eleven intersections are identified within the Transpo Report at 1-7, Cascade Ex. 470.

² Ordinance 907 has been repealed by Ordinance 930.

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1 Hearing Memorandum at 5-6, the City and the County formed the CAG to work
2 collaboratively to develop a plan for redevelopment of the Burke-Gilman Trail. Ex. 503,
3 Memorandum of Understanding. The CAG's recommendations were supported by the work of
4 many professionals, including: Atelier, landscape architects; PLS, Inc., land surveyors; HWA
5 Geosciences, geotechnical engineers; Adolfson Associates, wetland consultants; Tina Cohen,
6 arborist; and The Transpo Group; traffic engineers. See City Ex. 532. These consultants
7 assisted the CAG in reaching its recommendations, which are set forth at Cascade's Ex. 750
8 and 751. Despite agreeing to work collaboratively with the County towards a proposal for
9 redevelopment of the Burke-Gilman Trail, when it apparently did not like the CAG's initial
10 recommendations, Ex. 750 (Phase 1 Final Report, February 17, 2006), the City then chose to
11 engage its own consultant who was apparently willing to support the City's positions with
12 regard to the trail. See Huitt-Zollers report of April 4, 2006, set forth at City Ex. 595. Not only
13 is the Huitt-Zollars report not a part of the CAG process, but its analysis has been rejected as
14 factually inaccurate and contrary to adopted standards. See Ex. 610, King County Draft
15 Response to Huitt-Zollars of July 14, 2006, attached to this reply. Because it was not part of
16 the CAG process, but retained to undercut that process, the Huitt-Zollars report should not be
17 taken at face value.

20 And third, as is argued further below, Ordinance 909, which subjected multi-use trails
21 to the conditional use process, does not insulate from review by this Board the City's
22 requirement for conditional use permit review of regional trails because Ordinance 951 re-
23 enacts the requirement for conditional use permit review of multi-use trails. Under the newly
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1 adopted language set forth at §18.54.47.D.4, Ordinance 951 specifically makes the conditional
2 use permit criteria applicable to multi-use trails.

3 **III. ARGUMENT**

4 **A. Ordinance 951 Violates RCW 36.70A.200(5) by Impermissibly Allowing the** 5 **City to Deny and to Render Impracticable the Improvement of the Burke-** 6 **Gilman Trail, an Essential Public Facility.**

7 Cascade demonstrates within its Hearing Memorandum at 10-22 that Ordinance 951
8 applies to an essential public facility, the Burke-Gilman Trail and that the ordinance fails to
9 comply with RCW 36.70A.200(5) by allowing the City to outright deny improvement of the
10 trail and to render improvement of the Trail impracticable through the imposition of conditions,
11 including those that would conflict with standards adopted under state and federal law. The
12 City responds at 12-28 with two arguments, that the Burke Gilman Trail is not an essential
13 public facility and that Ordinance 951 does not preclude expansion of the trail, but “simply
14 provides a mechanism for requiring reasonable mitigation of impacts...” Response at 12. The
15 City’s contentions are ill-founded. Its characterization of the Burke-Gilman Trail is not
16 supported by the record before the Board and its characterization of Ordinance 951 ignores its
17 true legal effect.
18

19 **1. The Burke Gilman Trail, the Only Multi-Use Trail to Which Ordinance** 20 **951 Applies, Is an Essential Public Facility.**

21 Cascade at 12-14 demonstrates the Burke-Gilman Trail to be an essential public facility
22 under the criteria set forth at RCW 36.70A.200(1), WAC 365-195-340(2)(a)(ii)(A) and (B),
23 King County Comprehensive Plan Policy F-222 and three regional transportation plans.
24 Asserting that the Burke-Gilman Trail is not an essential public facility, the City advances
25 essentially four arguments: 1) while the trail may be a public facility it is not “essential”; 2) the

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1 trail is not listed under RCW 47.06.140 as a transportation facility of statewide significance; 3)
2 the City regards the trail as just another recreational facility; and 4) city streets and other
3 County trails serve the same purpose. None of the City's contentions are well founded.
4 Cascade replies to each of these arguments below.

5 **a. "Essential public facilities" is a term of art.**

6 The City's first argument rests upon an improper parsing of the term "essential public
7 facilities", which the City does by conceding the trail to be a public facility, but claiming it not
8 to be "essential", by which the City means that it is "not indispensably necessary to a function
9 of life[.]" Response at 13. The City's argument turns upon an improper parsing of a term of art
10 and a definition that does not exist by statute or regulation.

12 Under RCW 36.70A.200(1) the term "essential public facilities" is defined as "those
13 facilities that are typically difficult to site," with a number of examples given. Nothing within
14 the definition suggests that each of the three words be separately defined. Doing so would only
15 create a contradiction in that not even all of the examples given are either "essential" or even
16 "public". For example, substance abuse facilities and group homes undeniably provide
17 publicly beneficial services, but neither are "indispensably necessary to a function of life", as
18 the City would have it, nor are they, in general, publicly operated. As a category of use,
19 "essential public facilities" is a term of art and the City's parsing of words obscures, rather than
20 clarifies its meaning.

22 While regional trails, and the Burke-Gilman Trail in particular, may not meet the City's
23 proffered definition, they do meet the statutory definition of essential public facility, because
24 they are "typically difficult to site[.]" Two examples suggest themselves: the East Lake
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1 Sammamish Trail, which was constructed only after years of litigation, see County Prehearing
2 Brief at 4, fn 3; and the trail at hand, which the County has attempted to upgrade since 2000.

3 **b. The state's list of transportation facilities of statewide significance**
4 **does not purport to be an exclusive list of essential public facilities**
5 **for transportation.**

6 Absence from the Department of Transportation's list of transportation facilities of
7 statewide significance at RCW 47.06.140 does not disqualify the Burke-Gilman Trail as an
8 essential public facility. The listing at RCW 47.06.140 does not purport to be a listing of all
9 transportation facilities that are deemed to be essential public facilities. Because the State
10 Department of Transportation does not authorize, operate, or maintain them, regional trails,
11 such as the Burke-Gilman Trail, would logically not be on the state's list. From lack of
12 inclusion within the state's list, legislative intent to exclude regional trails as essential public
13 facilities cannot be inferred, as the City claims in its Response at 14. Under RCW
14 36.70A.200(1), transportation facilities of statewide significance are simply one of several
15 types of facilities considered to be essential public facilities. The operative definition of
16 "essential public facilities" is contained within RCW 36.70A.200(1), and not within RCW
17 47.06.140.
18

19 **c. The City's listing of the Burke-Gilman Trail as a park does not**
20 **diminish its status as an essential public facility.**

21 The City's listing of the Burke-Gilman Trail as a recreational facility is not
22 determinative either, especially given the City's evident hostility towards trail improvement.
23 Of far greater significance is the listing of the Burke-Gilman Trail within several regional
24 transportation plans, including the King County Regional Trails Plan, the King County Non-
25 Motorized Transportation Plan, and the Puget Sound Regional Council's Regional

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1 Transportation Plan. Further undercutting the City's characterization of the Burke-Gilman Trail
2 as just another recreational facility is the City's agreement within the Memorandum Of
3 Understanding, Ex. 503, that the Trail serves "as a regional and local transportation corridor."

4 **d. City streets and other county trails do not serve the same**
5 **function as the Burke-Gilman Trail.**

6 The City at 15-16 contends that the Burke-Gilman Trail is not "essential" in any
7 practical sense, allegedly on grounds that parallel streets "serve the same transportation
8 purpose", that the Trail is "not part of a 'countywide' service system", and that "streets,
9 roadways and parks" serve a "similar 'service' for bicyclists and pedestrians." The City's
10 argument ignores a number of inconvenient facts: the Burke-Gilman Trail is listed in a number
11 of regional and countywide transportation plans; the road that parallels the Burke-Gilman Trail,
12 SR-522, is a state highway whose shoulders and outside lanes have been converted to transit
13 lanes and whose speed of traffic and level of congestion prohibit use by bicycles; and the
14 Burke-Gilman Trail serves not just as a place to walk or ride a bicycle, which of course is also
15 provided by the Tolt Pipeline or the Maple Valley Trail, but as a transportation corridor used
16 by roughly 1200 daily commuters. See Cascade Ex. 736 (traffic counts); see also, Ex. 532,
17 Atelier Report at 32 ("Although it is owned by King County, Bothell, Kenmore, and Seattle . . .
18 [a]ll consider [the Burke-Gilman Trail] an important bicycle-commuting route, as does the
19 Washington Department of Transportation."). For a faculty member in Kenmore desiring to
20 use non-motorized travel for a commute to the University of Washington, a trail in Maple
21 Valley would provide no "similar service", any more than would SR 18 provide an alternative
22 route if she chose to drive.
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1 **2. Ordinance 951 Impermissibly Allows the City to Deny Improvement of**
2 **an Essential Public Facility.**

3 Cascade demonstrates within its Hearing Memorandum at 15-23 that Ordinance 951
4 impermissibly allows the City to deny improvement of the Burke-Gilman Trail, an essential
5 public facility, by granting the City's Hearing Examiner the authority to deny the necessary
6 permit for trail improvement. In its Response at 16-22 the City essentially advances three
7 arguments: 1) the requirement for a conditional use permit was established by Ordinance 909
8 and is not part of this appeal; 2) Ordinance 951 does not authorize denial of conditional use
9 permit application; and 3) the criteria for permit approval are similar to those upheld by the
10 Board in other cases. The City ignores the legal realities of its actions.

11 **a. Conformance with conditional use permit criteria is required by**
12 **Ordinance 951.**

13 Ordinance 951 both requires conformance with conditional use permit criteria and it
14 grants the Hearing Examiner authority to deny a permit that fails to conform with those criteria.
15 The City at 18 argues that compliance with the conditional use permit criteria under §18.54.030
16 is established by Ordinance 909, that that provision provides the "sole basis" for the claim that
17 Ordinance 951 authorizes denial of a conditional use permit for a multi-use trail and that since
18 neither Cascade nor the County have challenged Ordinance 909, both are barred from arguing
19 that Ordinance 951 authorizes outright denial. The City misrepresents the effect of Ordinance
20 951 and ignores the Board's prior ruling in *King County, et al. v. Snohomish County, (King*
21 *County I)*, Case No. 03-3-0011, Order Finding Continuing Noncompliance and Invalidity, etc.
22 (May 26, 2004).
23
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1 The City wrongly asserts that Ordinance 909, and not Ordinance 951, requires multi-
2 use trails to conform with the conditional use permit criteria. Within its amended language
3 Ordinance 951 expressly provides at §18.54.47.D.4 that:

4 D. Any conditional use for a multi-use trail or multi-purpose trail

5 ***

6 4. Shall comply with all applicable requirements of this [conditional use
7 permit] chapter; provided that in addition to the site plan required by
8 LFPMC 18.54.021, the applicant shall provide to the satisfaction of the
9 hearing examiner [the traffic control plan, trail development plan and
10 trail maintenance plan]

11 Ex. 418 (emphasis supplied). Whatever the effect of Ordinance 909, Ordinance 951 clearly re-
12 enacts the requirement for a multi-use trail to satisfy all of the criteria for a conditional use
13 permit, including the general, subjective criteria set forth at §18.54.030. Any other conclusion
14 ignores the express language at §18.54.47.D.4.

15 Also, Ordinance 951 re-establishes the conditional use permit requirement by
16 specifying that a regional multi-use trail is subject to the conditional use permit criteria. Under
17 Ordinance 909, the terms "multi-use trail" and "multi-purpose trail" were not defined, and
18 could have applied to any trail. See City Ex. 422. Ordinance 951 at §18.54.47.B added a
19 definition of multi-use trail to mean "a paved recreational path for non-motorized users that
20 connects with or continues with such paths in other cities..." By including a definition of the
21 term, Ordinance 951 made the conditional use permit criteria specifically applicable to the
22 Burke-Gilman Trail, since it is the only recreational trail in Lake Forest Park that connects with
23 trails in other cities. And by specifically applying the conditional use permit process to
24 regional trails, the City extended the ordinance to an area where its discretion is further limited
25 by GMA, as this Board recognized in *King County I*, Final Decision and Order at 12:

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1 EPFs that are sited by a regional or state agency are distinct from those that are "sited
2 by" a local jurisdiction or a private organization or individual. When a local jurisdiction
3 is contemplating its own EPF, public or private, it is free to establish a no-preclusive
4 siting process with any criteria it deems relevant.

5 However, when the siting decision is made by a state or regional agency, the role of the
6 host jurisdiction is much more limited. It may attempt to influence the siting decision
7 "by means such a providing information to the regional body, commenting on the
8 alternatives under consideration, or expressing its local preference in its comprehensive
9 plan." *Sound Transit*, at 6. But once a site has been chosen regionally, local plans and
10 regulations cannot preclude it, even if those plans predate the EPF's conception. "If a
11 decision regarding an EPF follows the adoption of a plan, and if the plan violates the
12 .200 duty 'not to preclude,' the jurisdiction has a duty to amend its plan." *Port of
13 Seattle*, at 8.

14 Thus, by specifically making the conditional use permit criteria applicable to regional trails, the
15 authority exercised by the City under the subjective criteria at §18.54.030 is properly reviewed
16 by the Board for compliance with RCW 36.70A.200(5).

17 But even assuming, for purposes of the City's argument, that the requirement for
18 conditional use permits for expansion of a regional trail had only existed as a matter of prior
19 law, the Board is still entitled to find those conditional use permit criteria non-compliant with
20 GMA. In its Order Finding Continuing Noncompliance and Invalidity entered in *King County*
21 *I* at 17, this Board encountered a similar situation where an ordinance specifically addressing
22 another type of essential public facility, a septic sewage treatment plant, required compliance
23 with previously adopted conditional use permit criteria:

24 The Board acknowledges Snohomish's position that this section of the Code was not
25 amended by the Ordinance at bar. Nevertheless, Ordinance No. 04-019 creates "as
26 applied" GMA noncompliance – by its explicit terms, it requires regional state or
27 federal EPFs to get a CUP and therefore subjects them to the criteria at 30.42C.100(1).

28 The same situation applies here. Even if the City had not adopted the provision under
29 §18.54.47.D.4, the requirement that permits for multi-use trails comply with subjective

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1 conditional use permit criteria would still be reviewable by this Board because Ordinance 951
2 specifically subjects regional essential public facilities to the conditional use permit process.

3 **b. Ordinance 951 authorizes denial of a trail permit.**

4 It is specious for the City to suggest that its ordinance does not authorize the Hearing
5 Examiner to deny a conditional use permit for a multi-use trail, which the City at 19 claims on
6 the asserted ground that "[t]he word 'deny' is not found in the ordinance." The City is being
7 either incredibly literal or completely disingenuous.

8
9 In the consideration of a conditional use permit application for a multi-use trail, the
10 Hearing Examiner's authority clearly includes permit denial. Section 18.54.030 (made
11 applicable through newly adopted Section 18.54.47.D.4) clearly provides that "[a] conditional
12 use may be authorized" upon the Hearing Examiner's finding that it conforms with both the
13 specific development criteria under Ordinance 951 and the ten minimum criteria under
14 subsection .030. Nothing suggests that the converse is not also true, that an application failing
15 to meet those two sets of criteria may not be authorized. Such a reading of the code conforms
16 with the City's land use procedures at Chapter 16.26.110 which provide that only "[a] Type I
17 [including conditional use permit] application that complies with the applicable decision
18 criteria shall be approved[.]" The City's suggestion that the Examiner lacks authority to deny a
19 noncompliant application contradicts the plain language of the code.

20
21 Not only does Ordinance 951 allow the County to outright deny a conditional use
22 permit in violation of subsection .200(5), but it also does so on impermissible criteria. Within
23 *King County I*, Order Finding Continuing Noncompliance, etc. at 17 the Board found those
24
25

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1 provisions within Snohomish County's conditional use permit review criteria shown in bold to
2 violate RCW 36.70A.200(5):

3 ...the hearing examiner may approve, approve with conditions, or **deny** a conditional
4 use permit only **when all of the following criteria are met:**

- 5 (a) The proposal is **consistent with the comprehensive plan;**
6 (b) The proposal complies with applicable requirements of this title;
7 (c) The proposal will **not be materially detrimental to uses or property in the**
8 **immediate area.**

9 (Emphasis in original). Lake Forest Park's conditional use permit criteria include the same
10 requirements as the Board invalidated in *King County I*. Lake Forest Park's conditional use
11 permit criteria provide in part:

12 A conditional use may be authorized upon a finding that the proposal conforms to
13 specific development criteria established for that use, if any, and **that it meets the**
14 **following minimum criteria:**

15 A. The proposed use **is consistent with** the policies and goals of **the comprehensive**
16 **plan;**

17 B. The proposed use is **not materially detrimental to other property in the**
18 **neighborhood;**

19 LFPMP 18.54.030 (Emphasis supplied). Where this Board has previously found that criteria
20 using the identical language violate RCW 36.70A.200(5) the result in this case can be no
21 different.

22 As Cascade has shown within its Hearing Memorandum at 7-8 and 15-16, other criteria
23 under subsection .030 and subsection .047 also provide a subjective basis for permit denial
24 similar to the criteria found to be non-compliant in *King County I*. For instance, subsection
25 .030 requires that in order to be approved a regional trail: must "supply goods or services that
will satisfy a need of the community"; be "compatible with the character and appearance with
the existing or proposed development in the vicinity"; and "not adversely affect public services

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1 to the surrounding area". See §18.54.030.C, .D and I. And further, section 18.54.47.D.4.b
2 requires that a trail provide for "compatibility with the character and appearance of
3 development in the vicinity" and preserve "the privacy of adjacent uses". These requirements
4 are similar to the standard that a proposal "not be materially detrimental to uses or property in
5 the immediate vicinity" that was invalidated by the Board in *King County I*. These general,
6 subjective criteria carry two defects: they lack any guidance for an applicant to determine on
7 what conditions a proposal might be approved; and they subordinate the siting and
8 improvement of regional facilities to purely local concerns.
9

10 Through much convoluted argument the City appears to contend that the holding in
11 *Department of Corrections v. City of Lakewood*, Case No. 05-3-1143c, Final Decision and
12 Order (January 31, 2006) somehow alters the holding above in *King County I*. It does nothing
13 of the sort. In *Lakewood*, the Board found a moratorium upon correctional facilities to be a
14 development regulation under GMA that precluded the siting of an essential public facility.
15 From this holding the City argues that somehow the Board gave specific approval to each of a
16 number of conditional use permit criteria which were never part of the Board's decision. Of
17 course, it would have been beyond the authority of the Board to issue an advisory opinion on
18 the compliance of those permit criteria. RCW 36.70A.290(1).
19

20 **3. Ordinance 951 Violates RCW 36.70A.200(5) by Requiring the**
21 **Imposition of Conditions that Would Render Impracticable the**
22 **Improvement of the Burke Gilman Trail.**

23 Cascade demonstrates in its Hearing Memorandum at 20-23 that Ordinance 951
24 violates subsection .200(5) by requiring the imposition of conditions that would render
25 improvement of the Burke-Gilman Trail impracticable. The City responds at 23-28 that it may

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1 use the conditional use permit process to impose conditions for mitigating impacts, which is
2 true, and that is all that Ordinance 951 does, which is not true.

3 Cascade acknowledges that the Board has found in prior cases that a local government
4 has the authority to impose reasonable conditions to mitigate impacts from a state or regional
5 public facility. However, Ordinance 951 goes beyond authorization of mitigation measures by
6 allowing, and even mandating, conditions that would render the County's proposed
7 improvement of the Burke-Gilman Trail impracticable. Ordinance 951 does this most blatantly
8 through its right-of-way and signage requirements, by instructing the Hearing Examiner to
9 "[a]void, whenever possible, altering traffic flows and patterns that are normal and customary
10 to neighborhoods through which a trail passes or will pass..." and by requiring the posting of
11 yield and stop signs for trail users in order to maintain the right-of-way for motor vehicle
12 traffic across the Trail. §18.54.47.A.4.a and D.1. Cascade at 21-23 and the County at 16-18
13 show that these requirements conflict with standards adopted by county, state and federal law.
14 The City responds at 26-28 that the ordinance's signage provisions are supported by the report
15 of its own expert, Huitt-Zollars, that violations of standards adopted by county, state and
16 federal law are beyond the scope of the Board's jurisdiction and that Ordinance 951's
17 interference with funding for the trail is speculative. None of these contentions are well
18 founded.
19
20

21 First, within this argument and within its response to Legal Issue No. 4 regarding lack
22 of permit predictability, the City argues that the AASHTO and the MUTCD standards do not
23 mandate that right of way be given to trail users, but rather allow for the placement of signage
24 based upon engineering judgment. Assuming that to be the case, Ordinance 951 still violates
25

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1 subsection .200(5) because it does not even allow for the exercise of sound engineering
2 judgment. At §18.54.47.D.1 Ordinance 951 mandates that the Hearing Examiner impose a
3 yield or stop sign at each of the 11 intersections. See §18.54.047.D.1 ("any conditional use for
4 a multi-use trail. . . [s]hall require. . . a yield sign. . . or. . . a stop sign for trail users[.]" (emphasis
5 supplied)). Even if the City is correct, that under the AASHTO and MUTCD standards sound
6 engineering judgment plays a role in signage decisions, Ordinance 951 still conflicts with those
7 standards because it leaves no room for the exercise of such judgment.

8
9 Moreover, the City's position that right-of-way preference be given to vehicles in
10 driveways over trail users conflicts with state statute. Under RCW 46.61.205, the driver of a
11 vehicle entering a public highway from a private road or driveway is required to yield to all
12 vehicles on the highway.³ As applied to here, this provision requires that drivers of vehicles in
13 driveways and other private roads yield to bicyclists using the Burke-Gilman Trail because by
14 law bicycles are vehicles and bike trails are part of the public highways. Under RCW
15 46.04.197 "every public way . . . for purposes of vehicular travel" is a public highway.⁴ A path
16 open to bicyclists is included within the definition of public highway because under RCW
17 46.04.670 a bicycle is defined as a vehicle.⁵ Accordingly, by granting the right-of-way to
18
19

20 ³ RCW 46.61.205 provides:

21 The driver of a vehicle about to enter or cross a highway from a private road or driveway shall
22 yield the right of way to all vehicles lawfully approaching on said highway.

23 ⁴ RCW 46.04.197 provides:

24 Highway means the entire width between the boundary lines of every way publicly maintained
25 when any part thereof is open to the use of the public for purposes of vehicular travel.

⁵ RCW 46.04.670 provides:

"Vehicle" includes every device capable of being moved upon a public highway and in, upon,
or by which any persons or property is or may be transported or drawn upon a public highway,

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1 vehicles entering the trail from driveways and other private roads Ordinance 951 violates the
2 rules of the road established under Chapter 46.61 RCW. By requiring the County to erect
3 signage and allocate right of way in a manner that conflicts with state statute, Ordinance 951
4 renders improvement of the trail impracticable by imposing requirements that lawfully cannot
5 be discharged.

6 Second, considerations of consistency of Ordinance 951's requirements with standards
7 adopted by county, state and federal law do lie within the Board's jurisdiction. This appeal
8 does not ask the Board to find Ordinance 951 out of compliance with these non-GMA laws, but
9 rather to find that Ordinance 951 renders improvement of the Burke-Gilman Trail
10 impracticable by imposing mandatory requirements that the County cannot lawfully satisfy.

12 And third, there is nothing speculative about petitioners' arguments. The inconsistency
13 between Ordinance 951 and the standards of AASHTO and MUCTD that are made applicable
14 through county, state and federal laws is apparent from a facial examination of these laws. To
15 require the county first to apply and then be rejected for funding before advancing this
16 argument would impose an impossible and unnecessary barrier to resolution of this claim.

18 **B. The City Has No Process for the Siting of Essential Public Facilities.**

19 In response to a Public Disclosure Act Request by Cascade Bicycle the City Clerk
20 responded on December 13, 2006 that "...a process has not been established for reviewing
21

22 including bicycles. The term does not include power wheelchairs or devices other than bicycles
23 moved by human or animal power or used exclusively upon stationary rails or tracks. Mopeds
24 shall not be considered vehicles or motor vehicles for the purposes of chapter 46.70 RCW.
25 Bicycles shall not be considered vehicles for the purposes of chapter 46.12, 46.16, or 46.70
RCW. Electric personal assistive mobility devices are not considered vehicles or motor vehicles
for the purposes of chapter 46.12, 46.16, 46.29, 46.37, or 46.70 RCW.

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1 proposals for siting essential public facilities.” In its Response at 48-53 the City now disavows
2 that earlier representation and offers three arguments in response: 1) the City “has adopted
3 policies regarding essential public facilities in its Comprehensive Plan[.]” 2) Cascade Bicycle’s
4 challenge comes too late because it is really a challenge for failure to comply rather than one
5 for failure to act; and 3) the City Clerk’s letter does not prevent the City from changing its
6 position. These arguments as well all lack merit.

7
8 First, the many policies cited by the City at 49-51 only reconfirm the point made by
9 Cascade Hearing Memorandum at 24, that the City has adopted a policy within its
10 Comprehensive Plan at CF 42 that describes what should be included in some future process
11 for the siting and identification of essential public facilities, but it does not constitute such a
12 process itself. Nor does such a process exist within any of the policies cited by the City. The
13 policies cited by the City are summarized as follows:

14 The Capital Facilities and Siting Essential Public Facilities element states that it
15 includes an inventory of capital facilities and that “[t]his element also includes a
16 process for siting all essential public facilities...”;

17 The Capital Facilities and Siting Essential Public Facilities element does contain a
18 paragraph entitled, “Criteria for Siting Essential Public Facilities”, however the first
19 two sentences of that paragraph restate the requirements of RCW 36.70A.200(1) and
20 then that paragraph goes on to state what some future “process [for identifying and
siting essential public facilities] is to include”, including definitions, inventories,
incentives, public participation and consideration of alternatives;

21 Goal CF 2, entitled “Capital Facilities and Siting Essential Public Facilities: Siting”
22 only states that the city is “[t]o establish criteria for the siting of capital facilities in
Lake Forest Park[.]” apparently at some point in the future;

23 Goal CF 4, entitled “Capital Facilities and Siting Essential Public Facilities: Impacts
24 and Public Participation” sets forth two policies: Pol. CF 4.1, stating an intent by the
25 City to “seek an agreement with neighboring jurisdictions...due to the siting[.]” and
Pol. CF 4.2 which, as earlier noted, directs the City to “[e]stablish a process for

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1 reviewing proposals for siting essential public facilities[,]” again at some point in the
2 future.

3 City’s Appendix A cited within its Response at 49-51. Thus, the City’s tour of its
4 Comprehensive Plan goals and policies brings the matter full circle back to the point of the
5 beginning of this analysis with Policy CF 4.2, which contains direction for the City to adopt a
6 process at some point in the future. The sequence of policies does not establish the required
7 process for identifying and siting essential public facilities, nor does it exist elsewhere.⁶ To
8 borrow Gertrude Stein’s description of Oakland, the problem with the City’s many referenced
9 policies is that “[t]here is no there there.”⁷

10 Second, because there is no adopted siting process, this issue presents a failure to act
11 question, not a question concerning the substance of an adopted process. The various
12 provisions cited by the City make clear that its comprehensive plan only sets forth the
13 ingredients of some future siting process and not the siting process itself. The initial
14 representation by the City Clerk is correct.

15 Third, while Cascade did not specifically argue estoppel, nothing would prevent
16 application of the doctrine of estoppel in this instance. Cascade Bicycle did not request the
17 City Clerk for her legal interpretation as to the meaning or construction of the City’s
18 comprehensive plan, but rather for public records that would establish the process for the
19 identification and siting of essential public facilities, a question of fact upon which the City
20
21

22
23 ⁶ Apparently the conditional use process is not the process for the identification and siting of essential
24 public facilities either because none of the various goals and policies make reference to the existing
25 conditional use permit process and the conditional use permit process addresses such things as
churches, cemeteries and kennels, not the kind of facilities referenced in RCW 36.70A.200(1).

⁷ Gertrude Stein, *Everybody’s Autobiography*, Chapter 4 (1937).

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1 Clerk may bind the City. Cascade's request was submitted after the adoption of Ordinance 951,
2 during the 60-day appeal period when it was evident to anyone within the city that Cascade
3 was preparing to appeal Ordinance 951. Under these circumstances it cannot be assumed that
4 the City Clerk provided her response without careful consideration by others.

5 **C. Ordinance 951 Violates RCW 36.70A.020(3) by Failing to Encourage Multi-**
6 **Modal Transportation.**

7 Under GMA Goal 3 the City has a duty to "[e]ncourage efficient multi-modal
8 transportation systems that are based on regional priorities and coordinated with county and
9 city comprehensive plans." RW 36.70A.030(3). In contrast to the obligation under subsection
10 .200(5) to not preclude essential public facilities, Goal 3 requires the City to take affirmative
11 steps to "encourage" those multi-modal transportation systems that are based on "regional
12 priorities" and "coordinated with" the comprehensive plans of other jurisdictions. The Burke-
13 Gilman Trail is such a multi-modal system, providing non-motorized travel for between 366
14 and 1240 bicyclists per day among the cities of Bothell, Kenmore, Seattle and Lake Forest
15 Park. See Cascade's Ex. 736 (traffic counts) and City Ex. 432 (Atelier Report). The promotion
16 of this multi-modal system is a regional priority, as clear from its listing within the PSRC
17 Regional Transportation Plan and King County's Non-Motorized Transportation Plan, with
18 which the City's plan and development regulations must be coordinated. Thus, Goal 3 requires
19 the City to affirmatively encourage use of the Burke-Gilman Trail as a regional transportation
20 facility. But rather than encouraging this multi-modal facility, the City principally has sought
21 to frustrate the County's efforts to upgrade the Trail.

22 Nothing within Ordinance 951 encourages use of the Burke-Gilman Trail as a non-
23 motorized transportation system. To the contrary, the ordinance seeks to subordinate use of the

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1 trail as a regional transportation facility to parochial considerations, including its objectives of
2 “not altering existing traffic flows and patterns”, not “impeding ... ingress and egress to and
3 from adjacent . . . uses”; maintaining the “privacy of adjacent uses”; requiring trail users to
4 stop or yield to cross trail traffic, and by requiring the Trail to be “compatible with the
5 character and appearance of development in the vicinity . . .” See Sections. 18.54.47.A.4.a & b
6 and .47.D.1 & 4. Virtually nothing within Ordinance 951 affirmatively encourages the multi-
7 modal transportation functions served by the Burke-Gilman Trail.
8

9 The City’s Response at 14-16 on this issue only perpetuates such parochialism, such as
10 its suggestion that city streets paralleling the Trail and other trails located elsewhere in the
11 County already serve the same purpose. The City has only one non-motorized transportation
12 route and suggesting that city streets and other trails within the County encourage non-
13 motorized travel through the City is absurd.
14

15 **D. Ordinance 951 Conflicts With RCW 36.70A.020(7) by Creating an Unfair and
16 Unpredictable Permit Processing System.**

17 Goal 7 requires that applications for governmental permits “be processed in a timely
18 and fair manner to ensure predictability.” Cascade at 27-29 demonstrates why the permit
19 review required by Ordinance 951 results in an unfair and unpredictable process. The County
20 at 15-19 further shows why Ordinance 951’s requirements conflict with uniform signing
21 standards adopted by county, state and federal law, an issue which Cascade raised as presenting
22 a violation of subsection .200(5). Here Cascade Bicycle limits its reply to the argument
23 concerning noncompliance with Goal 7 raised in its own opening brief.
24

25 In its response to Cascade’s argument under Goal 7 the City at 32-33 argues that
Ordinance 951 is not unpredictable, but simply provides “various options for mitigating

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1 impacts” and that the subjective criteria under §18.54.030 were enacted by Ordinance 909 and
2 therefore are beyond review in this appeal. Neither contention is true.

3 First, assurance of predictability is required for all application procedures. Even if
4 conditional use permit criteria under Ordinance 951 were found to be compliant with RCW
5 36.70A.200(5) those criteria would also need to satisfy Goal 7’s requirement of ensuring
6 permit predictability. However, the subjective standards within Ordinance 951 lack any
7 guidance as to how a Hearing Examiner would determine that a proposed trail improvement
8 would “maintain compatibility . . . with neighborhoods”, protect the “privacy of adjacent uses”,
9 be “compatible with the character and appearance of development in the vicinity” and satisfy
10 “the needs of the community.” §§18.54.47.A.1, .47.D.4.b.i and .030.C. These determinations
11 are left to nothing more specific than what might satisfy the eyes of the beholder. For example,
12 other than just being a number pulled out of the air, these criteria would leave an Examiner
13 with no objective, principled basis on which to conclude that an 8 foot paved surface, but not a
14 12 foot wide trail, would be necessary to protect the “privacy of adjacent uses”.
15

16
17 Second, for reasons given above, Ordinance 951’s lack of enactment of the subjective
18 conditional use permit criteria under section .030 is immaterial since Ordinance 951 at
19 §18.54.47.D.4 re-enacted the requirement that a multi-use trail conform with those criteria.

20 **E. Ordinance 951 Violates RCW 36.70A.020(9) by Failing to Encourage the**
21 **Development of Parks and Recreation Facilities.**

22 Goal 9 also impose another affirmative obligation upon the City, to “enhance
23 recreational opportunities”. Since 2000 King County has been attempting to upgrade the
24 Burke-Gilman Trail, which for the most part the City has obstructed, for example by imposing
25 silly requirements, such as restricting the use of at-grade crossings under Ordinance 907, by

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1 undercutting the work of the CAG through the engagement of a separate consultant to support
2 the City's desired position with regard to signing and right-of-way preference, and by imposing
3 subjective, standardless criteria through Ordinance 951. The City at 37-38 in fact offers no
4 substantive response to this argument, simply offering up arguments advanced in response to
5 the issues contending non-compliance with subsection .200(5) and GMA Goals 3 and 7, which
6 of course deal with different GMA standards.

7
8 **F. Ordinance 951 Violates RCW 36.70.A.020(12) by Failing to Assure the Future
Availability of Non-Motorized Transportation Facilities.**

9 Goal 12 requires that the City ensure that public facilities and services are adequate to
10 meet the needs of future development. The City responds at 38 that there exists no evidence
11 that streets and sidewalks can't accommodate non-motorized transportation needs and that
12 adequate opportunities already exist for recreation in the city. Once again, the City refuses to
13 recognize the regional transportation function served by the Burke-Gilman Trail, which cannot
14 be served by sidewalks or city streets. Not only is Lake City Way (the single street that
15 parallels the Burke-Gilman Trail through Lake Forest Park) extraordinarily hostile and unsafe
16 for bicycling, significant stretches even lack sidewalks. Nor could other recreational facilities
17 in the City, *e.g.* Hamlin Park off of Eighth Avenue Northeast or Bruggers Bog Park off of
18 Ballinger Way, Cascade Bicycle's Exhibit A, replicate the functions served by the Burke-
19 Gilman Trail.
20
21

22 **G. The City Adopted Ordinance 951 in Violation of SEPA.**

23 The City implicitly admits that it adopted Ordinance 951 in complete disregard of
24 SEPA's obligations. But the City argues that the issue is moot because after this appeal was
25 filed the City prepared an environmental checklist, issued a determination of nonsignificance

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1 and then passed Ordinance 958 to simply re-enact Ordinance 951. After the fact compliance
2 with SEPA cannot validate an action already taken and the City advances no legal argument
3 that it can.

4 SEPA is an overlay statute. *Bellevue Farm Owners Ass'n v. State of Washington*
5 *Shorelines Hearings Bd.*, 100 Wn. App. 341, 354, fn 28, 997 P.2d 380 (2000). Its requirements
6 must be applied at the earliest stage in the proceeding so that the potential impacts of a
7 proposal can be considered before agency action is taken. *Alpine Lakes Protection Society v.*
8 *Washington State Dept. of Natural Resources*, 102 Wn. App. 1, 15-16, 979 P.2d 929 (1999).
9 Attempts to comply with SEPA after action has already been taken completely defeats SEPA's
10 overlay function. The City's approach of taking action first and then conducting SEPA review
11 later renders SEPA compliance a foregone conclusion. For that reason the courts have
12 uniformly invalidated agency actions that were taken without compliance with SEPA. *Barrie v.*
13 *Kitsap County*, 93 Wn. 2d 843, 861, 613 P.2d 1148 (1980) and *Weyerhaeuser v. Pierce*
14 *County*, 124 Wn.2d 26, 42, 873 P. 2d 498 (1994).
15
16

17 If the City's approach were acceptable the courts would simply leave intact agency
18 action rendered in violation of SEPA and remand the matter simply for the preparation of
19 further environmental documentation, as if it were simply a matter of completing paperwork.
20 Since such an approach would relieve the agency from its statutory obligation of giving actual
21 consideration to environmental factors and turn the SEPA process into nothing more than a
22 *post hoc* justification for action already taken, it has not been followed. Nor should it be
23 followed here.
24
25

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1 This issue is not moot because relief can still be granted. *City of Sequim v. Malkasian*
2 157 Wn.2d 251, 258, 138 P.3d 943 (2006) ("However, an issue is not moot if a court can
3 provide any effective relief.") Upon findings of non-compliance and invalidity, Cascade seeks
4 direction on remand that SEPA review be conducted as a part of the City's compliance, which
5 relief can and should be provided by the Board. Otherwise, the City may believe that after-
6 the-fact compliance with SEPA has been condoned.

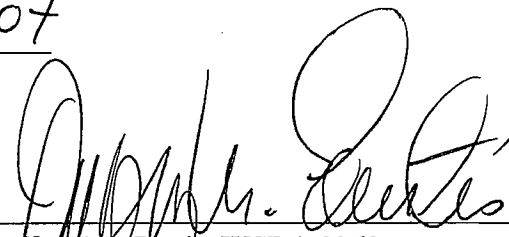
7
8 **H. Ordinance 951 Should Be Invalidated.**

9 In its Hearing Memorandum at 33 Cascade demonstrates that the continuing validity of
10 Ordinance 951 would substantially interfere with GMA goals 3, 7, 9 and 12 and should
11 therefore be invalidated. The City has provided no argument in response.

12 **IV. CONCLUSION**

13 For the reasons given above and within the prior hearing memorandum, the Board
14 should find that Ordinance 951 fails to comply with GMA and that it is invalid.

15 DATED: May 21, 2007

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18 
19 Jeffrey M. Eustis, WSBA 9262
20 Attorney for Cascade Bicycle Club

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DECLARATION OF SERVICE

The undersigned declares as follows:

I am an employee in the law office of Jeffrey M. Eustis, over the age of 18 years and competent to be a witness herein. On May 21, 2007 copies of the foregoing document were served on counsel of record herein by e-mail and by messenger as follows:

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I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

DATED

May 21, 2007

Patricia Young

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